

SUBJECT: DAC REPORT 08/12/20 - DA2015/0878.03 – 20A HILLVIEW CRESCENT, THE HILL - MODIFICATION TO DA2015/0878 - INCLUDING CHANGES TO FLOOR HEIGHTS AND PITCHING OF ROOFS

APPLICANT: HILLTOP PLANNERS PTY. LTD.
OWNER: S KCHEVETSKAIA, E NALIVAICO, A J KORLEVIC
REPORT BY: GOVERNANCE
CONTACT: DIRECTOR GOVERNANCE / MANAGER REGULATORY, PLANNING AND ASSESSMENT

PART I

BACKGROUND

A Modification Application (DA2015/0878.03) has been received seeking consent to modify development consent DA2015/0878 for a dual occupancy. The proposed modifications include changes to the floor, roof heights and roof pitch of both dwellings, re-location of water tanks and amendments to the approved internal and external wall locations.

The site is currently occupied by a partially constructed dual occupancy development which was approved under DA2015/0878. Construction ceased on 3 December 2019 as a result of the identification of unauthorised building works on site by City of Newcastle (CN). The unauthorised building works relate to the height of the building and the construction of external walls on adjoining properties.

The submitted application has been assigned to Senior Development Officer (Planning), Gareth Simpson, for assessment.

The application is referred to the Development Applications Committee (DAC) for determination as the application proposes a 19% variation to the maximum floor space ratio (FSR) development standard. The application was also called in by two Councillors: Councillor MacKenzie and Councillor Church.

A copy of the plans for the proposed development is at **Attachment A**.



Subject Land: 20A Hillview Crescent, The Hill

The application was publicly notified in accordance with CN's Community Participation Plan (CPP) and 12 submissions were received. Two submissions were from the same household and three submissions were late, accordingly, seven submissions were received within the notification period.

The concerns raised by the objectors in respect of the proposed development include:

- i) unauthorised works
- ii) impact on views
- iii) overshadowing
- iv) structural damage to adjacent structures including retaining walls
- v) impact on existing easements
- vi) the accuracy of the submitted information
- vii) lack of landscaped area for the units

Details of the submissions received are summarised at section 3.0 of Part II of this report and the concerns raised are addressed as part of the Planning Assessment at section 5.0.

Issues

1. Matters raised in the submissions including height, over development, view loss, overshadowing and lack of landscaping area on site.
2. Height of Buildings – the development has a maximum building height of 9.3m and does not comply with the maximum building height of 8.5m prescribed under clause 4.3 of the Newcastle Local Environmental Plan 2012 (NLEP 2012). This results in a variation of 9.4%. The applicant has submitted a clause 4.6 variation request.
3. Floor Space Ratio – the development has an FSR of 0.717:1 and does not comply with the maximum FSR of 0.6:1 prescribed under clause 4.4 of the NLEP 2012. This results in a variation of 19%. The applicant has submitted a clause 4.6 variation request.
4. Ongoing unauthorised works and compliance action.

Conclusion

The development has been assessed having regard to the relevant heads of consideration under section 4.15(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and is considered to be acceptable subject to compliance with appropriate conditions.

RECOMMENDATION

Vote by Division

- A. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012 (NLEP 2012), against the development standard at clause 4.3 Height of Buildings, and considers the objection to be justified in the circumstances and to be consistent with the objectives of clause 4.3 and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out; and
- B. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at clause 4.4 Floor Space Ratio (FSR), and considers the objection to be justified in the circumstances and to be consistent with the objectives of clause 4.4 and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out; and
- C. That DA2015/0878.03 at 20A Hillview Crescent, The Hill be approved, and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**.
- D. That those persons who made submissions be advised of CN's determination.

Political Donation / Gift Declaration

Section 10.4 of the *Environmental Planning and Assessment Act 1979* requires a person to disclose "*reportable political donations and gifts made by any person with a financial interest*" in the application within the period commencing two years before the application is made and ending when the application is determined. The following information is to be included on the statement:

- a) all reportable political donations made to any local Councillor of Council; and
- b) all gifts made to any local Councillor or employee of that Council.

The applicant has answered No to the following question on the application form: *Have you, or are you aware of any person having a financial interest in the application, made a 'reportable donation' or 'gift' to a Councillor or Council employee within a two year period before the date of this application?*

PART II

1.0 THE SUBJECT SITE

The subject site comprises Lot 202 DP 1116291. The lot is irregular in shape with a central rectangular area connected to two access handles running north to Hillview Crescent and south to Bingle Street. The lot is located to the north of Bingle Street, north-west of King Edward Park and to the south of Arcadia Park. Vehicular and pedestrian access is provided to Hillview Crescent to the north and Bingle Street to the south. The lot has a frontage to Hillview Crescent of approximately 7.8m and to Bingle Street of approximately 4.5m and a total area of 771.9sqm. The site slopes from Bingle Street to the south to Hillview Crescent to the north.

The site is currently occupied by a partially constructed attached dual occupancy development. The approved dual occupancy for the site comprises an attached three storey dwelling and two storey dwelling. Access to one dwelling is provided via Bingle Street and access to the other dwelling is provided by Hillview Crescent. The construction on site is on hold pending resolution of compliance matters.

The site is surrounded by residential properties to the north, south, east and west. To the south and west of the site are single dwellings. To the east of the site are a row of terraced dwellings and to the north of the site is an apartment block.

The site is within the R2 Low Density Residential zone under the NLEP 2012 and is located within a Mine Subsidence District.

2.0 THE PROPOSAL

The applicant seeks consent to modify DA2015/0878. This application proposes the following:

- i) Amendment to the floor levels of the development.
- ii) Amendments to the roof height of the development. Unit 1 roof height is partially lowered by 70mm and partially increased by 780mm and Unit 2 roof is partially lowered by 245mm and partially increased by 155mm.
- iii) Unit 1 ensuite wall re-located to enlarge ensuite.
- iv) Unit 1 garage increased in size by 430mm.
- v) Unit 2 external wall on western side squared off on the boundary.
- vi) Modifications to the internal layout of Unit 2.
- vii) Unit 2 garage increased by 1040sqm.
- viii) Alteration to external facade material to wall cladding material.

A copy of the submitted plans is at **Attachment A**. The various steps in the processing of the application to date are outlined in the Processing Chronology at **Attachment B**.

Public Voice Committee

The proposal was considered at a meeting of the Public Voice Committee held on 1 December 2020. Residents raised concerns with regards to building height, loss of views from surrounding properties, solar access, over development of the site and unauthorised work. The applicant has provided the following response to these issues.

Unacceptable increase in building height

Applicant's Response: The increase in height under this modification proposal will have minimum impact. The building height of the development is consistent with the height of surrounding properties and will not result in an unacceptable impact to the amenity of surrounding buildings.

Loss of views

Applicant's Response: An assessment of view loss has been undertaken and the development is not considered to result in an unacceptable view loss to surrounding properties. It is noted that the approved development for the site results in a greater view loss than the modification proposal. The modification proposal is considered to have minimal impact in regard to view loss.

Loss of solar access

Applicant's Response: Solar access studies have been provided with the development which demonstrate that surrounding properties will maintain acceptable solar access following completion of the development.

Over-development of the site

Applicant's Response: The bulk and scale of the development are already approved under DA 2015/0878. The modifications do not propose to substantially change the approved building bulk and scale.

Unauthorised development

Applicant's Response: This application seeks to regularise part of the unauthorised works that have taken place on site. The remaining unauthorised works (namely structures built on adjoining land without consent) are being resolved through CN's compliance process.

Lack of landscaped area on site

Applicant's Response: The development results in a sufficient area of landscaping.

Council has considered the matters raised in the public voice and responses from the applicant. Proposed height, view loss, solar access, bulk and scale and landscaping are considered to be satisfactory under the proposed modification and not substantially different to the approved development.

A copy of the current amended plans is appended at **Attachment A**.

The various steps in the processing of the application to date are outlined in the Processing Chronology at **Attachment C**.

Site Construction and Planning History

Given that this application involves unauthorised works that have already been completed, the history of planning and construction on the site is set out below in order to provide clarity as to the current status of the structures on site.

- i) On 5 May 2016, DA2015/0878 was approved by Council and development consent was given for the erection of two semi-detached three-storey dwellings, associated retaining walls, site works and one lot into two lots subdivision.
- ii) On 19 June 2019, DA2015/0878.01 was approved by Council for the modification and amendment of certain conditions.
- iii) On 24 June 2019, Construction Certificate CC/9025201 was issued by a private certifier (BuildCert Consultants) for the approved development.
- iv) On 4 October 2019, the private certifier (Private Building Certifiers Newcastle) inspected the garage wall footing and passed it as satisfactory.
- v) On 5 November 2019, CN received a complaint from a member of the public alleging that development works were not being carried out in accordance with the conditions of the Consent.
- vi) On 8 November 2019, the private certifier completed an inspection of the first floor slab and passed it as satisfactory. At this point, all required building inspections had been undertaken and passed as satisfactory.
- vii) On 12 November 2019, BuildCert advised CN that Private Building Certifiers Newcastle were now the certifying authority for the Works.
- viii) On 13 December 2019, CN received an application to modify the Consent for 'changes in floor levels.' The modification was identified as DA2015/0878.02.
- ix) On 13 December 2019, a 'Notice to Appoint a Replacement PCA' was submitted to CN, outlining CN as nominated to replace Private Building Certifiers Newcastle as the certifying authority.
- x) On 20 December 2019, CN issued a Notice of Intention (NOI) to Serve a Development Control Order to the site owners, proposing to serve a Stop Work Order that would require the builder to 'immediately cease conducting any construction activities at the site that require development consent under the EP&A Act. Building works on the site ceased.
- xi) On 6 February 2020, CN Development Assessment Officers inspected the site and reviewed the plans and specifications approved by the Consent and

the Construction Certificate. A number of discrepancies were identified between what was built on site and what had been approved.

- xii) On 14 April 2020 the modification application DA 2015/0878.02 was refused on the grounds of insufficient and incorrect information.
- xiii) On 17 April 2020, CN issued Notice of Intention (NOI) to serve a Development Control Order (DCO) to remove unauthorised works and provide documentation.
- xiv) On 29 May 2020, CN issued a Development Control Order (DCO) to remove unauthorised works and provide documentation.
- xv) On 24 June 2020, a modification application was lodged with CN for proposed amendments to the approved development on the subject site. This modification application (DA 2015/0878.03) is the subject of this report.

In summary, CN is of the understanding that all relevant stage inspections of the building were undertaken and passed by the private certifier prior to work stopping on site in December 2019. Since that time, no work has been undertaken on site except under authorisation by CN.

Unauthorised works and DA 2015/0878.03

The current modification application for the site (DA2015/0878.03) proposes the following works which include unauthorised works:

- i) Amendment to the floor levels of the development.
- ii) Amendments to the roof height of the development. Unit 1 roof height is partially lowered by 70mm and partially increased by 780mm and Unit 2 roof is partially lowered by 245mm and partially increased by 155mm.
- iii) Unit 1 ensuite wall re-located to enlarge ensuite.
- iv) Unit 1 garage increased in size by 430mm.
- v) Unit 2 external wall on western side squared off on the boundary.
- vi) Modifications to the internal layout of Unit 2.
- vii) Unit 2 garage increased by 1040sqm.

In addition to the above works, there is also the construction of a boundary wall on the western boundary of the site that is built on an adjoining neighbours land and a portion of wall constructed on the northern boundary of the site that is also on an adjoining neighbours land. Both these walls were constructed without the required approvals.

These issues do not form part of this application and are being dealt with by CN's compliance team who have issued a Development Control Order (DCO) for the

demolition of these walls and the construction of the walls on the subject site in accordance with the architectural plans for this modification application.

This application is not connected to the compliance matter regarding these walls which is being resolved through CN's compliance process. Therefore, these compliance issues are not considered in this report.

Post Approval Process

Should this modification application be approved, CN will be managing the construction process post-approval as the nominated Principle Certifying Authority (PCA). This will be undertaken by an A1 accredited building certifier within CN who has direct experience with this project and has been assisting in the assessment of the proposal throughout the recent compliance action.

This certifier has noted that at each stage of continued construction, he will require full certification of the works with the next inspection to occur being the frame inspection. Should any issues be identified as part of his inspection, he will have the power to ensure the works are corrected and built wholly in accordance with the approved plans.

The site owners can apply to change PCA at any time. However, the likelihood of this happening is considered remote. Should the site owners wish to appoint a new PCA, CN has to agree to the change of PCA and if CN do not agree an application to NSW Fair Trading to change the PCA would be required from the site owners. It is considered very unlikely that NSW Fair Trading would allow such a change to occur given the history of the site.

3.0 PUBLIC NOTIFICATION

The application was publicly notified in accordance with CN's CCP and 12 submissions were received. Two submissions were from the same household and three submissions were late, accordingly, seven submissions were received within the notification period.

The concerns raised by the objectors in respect of the proposed development are summarised as follows:

- i) unauthorised works
- ii) impact on views
- iii) overshadowing
- iv) structural damage to surrounding structures including retaining walls
- v) impact on existing easements
- vi) the accuracy of the submitted information
- vii) Lack of landscaped area on site

The objectors' concerns are addressed under the relevant matters for consideration in the following section of this report.

4.0 INTEGRATED DEVELOPMENT

The proposal is not 'integrated development' pursuant to section 4.46 of the EP&A Act.

5.0 PLANNING ASSESSMENT

The application has been assessed having regard to the relevant matters for consideration under the provisions of Section 4.15(1) of the EP&A Act, as detailed hereunder.

5.1 Provisions of any environmental planning instrument

State Environmental Planning Policy No 55 - Remediation of Land (SEPP 55)

SEPP 55 provides that prior to granting consent to the carrying out of any development on land the consent authority is required to give consideration to whether the land is contaminated and, if the land is contaminated, whether the land is suitable for the purpose of the development or whether remediation is required.

The subject land is currently being used for residential purposes and CN's records do not identify any past contaminating activities on the site. The proposal is considered to be acceptable having regard to this policy.

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (Vegetation SEPP)

The State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (Vegetation SEPP) is one of a suite of Land Management and Biodiversity Conservation (LMBC) reforms that commenced in New South Wales on 25 August 2017. The Vegetation SEPP (the SEPP) works together with the *Biodiversity Conservation Act 2016* and the *Local Land Services Amendment Act 2016* to create a framework for the regulation of clearing of native vegetation in NSW. Part 3 of the Vegetation SEPP contains provisions similar to those contained in clause 5.9 of the NLEP 2012 (now repealed) and provides that the Newcastle Development Control Plan 2012 (NDCP 2012) can make declarations with regards to certain matters, and further that CN may issue a permit for tree removal.

The subject site is clear of any native trees or vegetation. The applicant does not propose the removal of any vegetation in order to facilitate the development. The provisions of the Vegetation SEPP do not apply.

State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP)

The Coastal Management State Environmental Planning Policy (SEPP) came into effect on 3 April 2018. The SEPP seeks to balance social, economic and

environmental interests by promoting a coordinated approach to coastal management, consistent with the objectives of the *Coastal Management Act 2016* (Coastal Act).

The 'coastal zone' is defined in the Coastal Act as comprising four coastal management areas; coastal wetlands and littoral rainforest, coastal environment, coastal use and coastal vulnerability. Note: the Newcastle Local Government Area (LGA) has no areas identified in the coastal vulnerability map.

The site is within the Coastal Use Area. The proposed development is not inconsistent with the SEPP.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

A BASIX Certificate was lodged with the original application, demonstrating that the development can achieve the required water and energy reduction targets. Given the minor changes proposed, the requirements of the originally submitted BASIX Certificate will not change.

A condition of consent has been recommended, requiring that the BASIX Certificate be updated prior to the issuing of a Construction Certificate.

Newcastle Local Environmental Plan 2012 (NLEP 2012)

The following summarises an assessment of the proposal against the provisions of the NLEP 2012 that are primarily relevant to the proposed development.

Clause 2.1 - Land Use Zones

The subject property is included within the R2 Low Density Residential zone under the provisions of the NLEP 2012, within which the proposed development is permissible with CN's consent.

The proposed development is consistent with the objectives of the R2 Low Density Residential zone, which are:

- i) To provide for the housing needs of the community within a low-density residential environment.
- ii) To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- iii) To accommodate a diversity of housing forms that respects the amenity, heritage and character of surrounding development and the quality of the environment.

Response: The development will provide for a dual occupancy development and is considered to provide for the housing needs of the community in a low-density residential environment. The development will also provide for a diversity of housing that is considered to respect the character of surrounding development.

Clause 4.3 - Height of Buildings

The proposed development will result in a maximum height of 9.3m, equating to an exceedance of 800mm or 9.4% above the height of buildings development standard for the subject land.

The applicant has submitted a clause 4.6 variation request to this standard. Refer to discussion under clause 4.6 Exceptions to Development Standards below.

Clause 4.4 Floor Space Ratio (FSR)

The proposed development will result in a total FSR of 0.7171:1, equating to an exceedance of 19% above the prescribed maximum FSR for the subject land.

The approved development originally resulted in a total FSR of 0.689:1, equating to an exceedance of 16% above the prescribed maximum FSR for the subject land.

The applicant has submitted a clause 4.6 variation request to this standard. Refer to discussion under clause 4.6 Exceptions to Development Standards below.

Clause 4.6 - Exceptions to development standards

The proposal includes additions to a dwelling that exceeds the maximum height development standard under clause 4.3 of the NLEP 2012 and the maximum FSR development standard under clause 4.4 of the NLEP 2012.

Maximum Building Height Variation

Under the NLEP 2012 the site has a maximum building height of 8.5m. The submitted maximum height for the development is 9.3m, equating to an exceedance of 800mm or 9.4% above the height of buildings development standard for the subject land.

The objectives of clause 4.3 of the NLEP 2012 are:

- a) To ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy.
- b) To allow reasonable daylight access to all developments and the public domain.

Clause 4.6 of the NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard. In assessing the proposal against the provisions of clause 4.6, it is noted that:

1. Clause 4.3 is not expressly excluded from the operation of this clause; and
2. The applicant has prepared a written request that CN vary the development standard and demonstrating that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- b) There are sufficient environmental planning grounds to justify contravening the development standard.

The applicant's request to vary the height of building Development Standard is included beneath.

1.1 What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012.

1.2 What is the zoning of the land?

R2 Low Density Residential.

1.3 What are the objectives of the zone?

- i) *To provide for the housing needs of the community within a low density residential environment;*
- ii) *To enable for other land uses that provide facilities or services to meet the day to day needs of residents;*
- iii) *To accommodate a diversity of housing forms that respects the amenity, heritage and character of surrounding development and the quality of the environment.*

1.4 Why is the development standard being varied? eg. FSR, height, lot size

Height.

1.5 Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.3 Height of Buildings (HoB).

1.6 What are the objectives of the development standard?

- i) *The objectives of this clause are as follows —*
 - a) *to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*
 - b) *to allow reasonable daylight access to all developments and the public domain.*
- 2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The proposed development meets the objectives of the HOB development standard, as the scale of development makes a positive contribution to the desired built form within the locality and the scale of the development allows for reasonable solar access to the proposed and adjoining developments in accordance with CN's controls.

1.7 What is the numeric value of the development standard in the environmental planning instrument?

8.5 metres.

1.8 What is the proposed numeric value of the development standard in your development application?

The proposed numeric value of the Development Standard in the NLEP 2012 is 9.3m for the highest point of the roof. An exceedance of 800 mm.

1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation between the numeric value of the Development Standard and the proposed numeric value of the Development Standard is 9.4%.

1.10 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Strict compliance with the Development Standard is unnecessary or unreasonable in this case for the following reasons.

- i) The height of the development meets the objectives of the Development Standards in that it the height will be consistent with the built form of the context and will allow reasonable daylight access to all developments and the public domain.*
- ii) The proposal will result in no real impact to neighbours in terms of privacy and, overshadowing and would result in only a minor reduction in existing views from the properties surrounding the site including 16 Bingle Street. The objective of view sharing in relation to the Development Control Plan has been achieved.*
- iii) The additional height is considered minimal in relation to the scale of the approved development on the site.*
- iv) The proposed addition would maintain privacy to adjoining development using screening to all balconies and the use of highlight windows.*

The proposed height increase will not be visible from the public domain of Bingle Street and will not be noticeable from Hillview Crescent.

- v) The proposed height increase will not cause non-compliant overshadowing of adjacent properties; and will be articulated with changes to the roof form.*

- vii) *The height increase does not impact on the setbacks, siting and form of the approved development for the site and the development meets the objectives of the NDCP 2012.*
- viii) *The building height increase has already occurred on site.*
- ix) *The proposal has demonstrated that a development of high quality and amenity can be achieved under the proposed design, including compliance with setbacks, building separation distances, solar access, and natural ventilation.*
- x) *Strict compliance with the standard is unreasonable and unnecessary as it would not result in a better-quality development, or a development with less impact on adjoining housing than is currently proposed.*
- xi) *The outcomes will not adversely impact on the characteristics of the site or surrounding area to an extent that would warrant such a limitation when having regard to the existing and proposed built form, visual impacts, views to and from the site and positive social impacts. Therefore, the standard is unreasonable and unnecessary.*

1.11 How would strict compliance hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act.

The objects of the EP&A Act are as follows —

- (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;*
- (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) *to promote the orderly and economic use and development of land,*
- (d) *to promote the delivery and maintenance of affordable housing,*
- (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) *to promote good design and amenity of the built environment,*
- (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the Development Standard would hinder the attainment of objects b) and g) in that the application seeks to provide for a less intrusive roof profile whilst ensuring the development provides sufficient floor to ceiling heights within the development.

Strict compliance with the standard would limit the ability of the site to provide a quality and high amenity residential development for the owners.

The proposed development is a permissible use in the zone and complies with the relevant development standards and controls (except for height). In this regard, the proposal represents the sustainable use of development of land.

1.12 Is the development standard a performance-based control?

No. The specific Development Standard is not a performance-based control.

1.13 Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary? Why?

The reason that strict compliance with the Building Height Standard would be unreasonable or unnecessary is that the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Further, the reason that strict compliance with the Building Height Standard would be unreasonable or unnecessary is that the underlying objective or purpose would be defeated or thwarted if compliance were required.

The reason that contravention of the Development Standard would be reasonable in this case is because the impact of the height on the surrounding area is negligible.

1.14 Are there Sufficient environmental planning grounds to justify contravening the development standard? Give details.

The environmental planning grounds to justify the contravention of the development standard are that the following objects of the EP&A Act would be met by allowing the variation of the development standard in this case.

Object b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.

This object would be met by the development providing a social benefit to the owners of the site, providing them with a house for life in addition to ensuring their property is economically viable.

Object g) to promote good design and amenity of the built environment.

This object would be met by the development providing an improved amenity through improved access for a wider section of the community which provides a good example of responsible design.

Conclusion

The proposal does not comply with the height of building standard prescribed by clause 4.3 of the NLEP 2012. Having evaluated the likely affects arising from this non-compliance, it is considered that the objectives of clause 4.6 of the NLEP 2012 are satisfied as the breach to the maximum building height does not create any adverse environmental planning impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and use of clause 4.6 of the NLEP 2012 to vary this development control is appropriate in this instance.

Based on the above, it is reasonable to conclude that strict compliance with the height of buildings standard is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

An assessment of the request has been undertaken and it is considered that:

- a) It adequately addresses the matters required to be demonstrated by clause 4.6(3); and
- b) The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out.
- c) The Secretary's concurrence to the exception to the height of buildings development standard, as required by clause 4.6(4)(b) of the NLEP 2012, is assumed, as per Department of Planning circular PS 20-002 of 05 May 2020.
- d) The proposed development exceeds the maximum building height by 800mm. The proposed building height exceedance is considered to be a minor variation and will have minimal impact on neighbouring properties in terms of privacy, overshadowing and view loss. The proposed height and scale of the development is in character with the surrounding locality. The proposed exception to the height of buildings development standard of the NLEP 2012 is considered to be a minor variation and strict compliance would be unreasonable and unnecessary.

It is considered that the applicant has demonstrated that the application of the standard is both unreasonable and unnecessary in this instance and that the proposed height and scale of development is in character with the surrounding locality. The request for the maximum building height to exceed 8.5m is supported.

Maximum Floor Space Ratio Variation

Under the NLEP 2012 the site has a maximum FSR of 0.6:1. The submitted FSR for the development is 0.717:1, equating to an exceedance of 19% above the FSR development standard for the subject land.

The objectives of clause 4.4 of the NLEP 2012 are:

- (a) to provide an appropriate density of development consistent with the established centres hierarchy.
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.

Clause 4.6 of the NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard. In assessing the proposal against the provisions of clause 4.6, it is noted that:

1. Clause 4.4 is not expressly excluded from the operation of this clause; and
2. The applicant has prepared a written request that CN vary the development standard and demonstrating that:
 - a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - b) there are sufficient environmental planning grounds to justify contravening the development standard.

The applicant's request to vary the FSR development standard is included beneath.

1.1 *What is the name of the environmental planning instrument that applies to the land?*

Newcastle Local Environmental Plan 2012.

1.2 *What is the zoning of the land?*

R2 Low Density Residential.

1.3 *What are the objectives of the zone?*

- i) To provide for the housing needs of the community within a low density residential environment;
- ii) To enable for other land uses that provide facilities or services to meet the day to day needs of residents;

- iii) To accommodate a diversity of housing forms that respects the amenity, heritage and character of surrounding development and the quality of the environment.

1.4 Why is the development standard being varied? eg. FSR, height, lot size

Floor space ratio.

1.5 Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.4 floor Space Ratio (FSR).

1.6 What are the objectives of the development standard?

- 1) *The objectives of this clause are as follows —*
 - a) *to provide an appropriate density of development consistent with the established centres hierarchy.*
 - b) *to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*
- 2) *The maximum FSR for a building on any land is not to exceed the FSR shown for the land on the FSR Map.*
- 2A) *Despite subclause (2), the maximum FSR for a building on land in any zone in this plan is to be determined as if the area of the access laneway of a battle-axe lot were not part of the area of the lot.*

The proposed development meets the objectives of the FSR development standard, as the scale of development makes a positive contribution to the desired built form within the locality and the scale of the development allows for reasonable solar access to the proposed and adjoining developments in accordance with CN's controls.

1.7 What is the numeric value of the development standard in the environmental planning instrument?

0.6:1

1.8 What is the proposed numeric value of the development standard in your development application?

The proposed numeric value of the Development Standard in the NLEP 2012 is 0.717:1.

1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation between the numeric value of the Development Standard and the proposed numeric value of the Development Standard is 19%.

1.10 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Strict compliance with the Development Standard is unnecessary or unreasonable in this case for the following reasons.

- i) The FSR of the development meets the objectives of the Development Standards in that it the FSR will be consistent with the built form of the context and will allow reasonable daylight access to all developments and the public domain.*
- ii) The proposal will result in no real impact to neighbours in terms of bulk and scale and will not impact on the privacy, views or overshadowing to properties surrounding the site including 16 Bingle Street.*
- iii) The approved development for the site has an FSR of 0.689:1. This application proposes a 2.8% or 19.35 sqm increase from that approved which is a minor increase.*
- iv) The proposed increase in area would maintain privacy to adjoining development.*
- v) The proposed FSR increase will not impact noticeably on the bulk and scale of the approved development.*
- vi) The proposed FSR increase will not cause non-compliant overshadowing of adjacent properties.*
- vii) The FSR increase does not impact on the setbacks, siting and form of the approved development for the site and the development meets the objectives of the NDCP 2012.*
- viii) Strict compliance with the standard is unreasonable and unnecessary as it would not result in a better-quality development, or a development with less impact on adjoining housing than is currently proposed.*

1.11 How would strict compliance hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act.

The objects of the EP&A Act are as follows —

- a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*

- b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- c) *to promote the orderly and economic use and development of land,*
- d) *to promote the delivery and maintenance of affordable housing,*
- e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- g) *to promote good design and amenity of the built environment,*
- h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- i) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- j) *to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the Development Standard would hinder the attainment of objects b) and g) in that the application seeks to provide for a better internal environment for future occupants whilst ensuring the development is a better fit on the site.

Strict compliance with the standard would limit the ability of the site to provide a quality and high amenity residential development for the owners. The proposal represents the sustainable use of development of land.

1.12 Is the development standard a performance-based control?

No. The specific Development Standard is not a performance-based control.

1.13 Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?

The reason that strict compliance with the FSR Standard would be unreasonable or unnecessary is that the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Further, the reason that strict compliance with the FSR Standard would be unreasonable or unnecessary is that the underlying objective or purpose would be defeated or thwarted if compliance were required.

The reason that contravention of the Development Standard would be reasonable in this case is because the impact of the FSR on the surrounding area is negligible.

1.14 Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

The environmental planning grounds to justify the contravention of the development standard are that the following objects of the EP&A Act would be met by allowing the variation of the development standard in this case.

Object b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.

This object would be met by the development providing a social benefit to the owners of the site, providing them with a house for life in addition to ensuring their property is a better fit for the site.

Object g) to promote good design and amenity of the built environment.

The object would be met as the design changes will ensure the house works more effectively on the site.

Conclusion

The proposal does not comply with the FSR standard prescribed by clause 4.4 of the NLEP 2012. Having evaluated the likely affects arising from this non-compliance, it is considered that the objectives of clause 4.6 of the NLEP 2012 are satisfied as the breach to the maximum FSR does not create any adverse environmental planning impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and use of clause 4.6 of the NLEP 2012 to vary this development control is appropriate in this instance.

Based on the above, it is reasonable to conclude that strict compliance with the FSR standard is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application. In addition, the variation is minor when compared against the approved variation for the original development.

An assessment of the request has been undertaken and it is considered that:

- a) It adequately addresses the matters required to be demonstrated by clause 4.6(3); and
- b) The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out.

- c) The Secretary's concurrence to the exception to the height of buildings development standard, as required by clause 4.6(4)(b) of the NLEP 2012, is assumed, as per Department of Planning circular PS 20-002 of 05 May 2020.
- d) The proposed development exceeds the maximum FSR by 19%. However, this variation is only 2.8% more than the variation approved for the original application for the site.

The proposed FSR exceedance is considered to be a minor variation and will have minimal impact on neighbouring properties in terms of bulk, scale, view loss, and overshadowing. The proposed scale of the development is in character with the surrounding locality. The proposed exception to the FSR development standard of the NLEP 2012 is considered to be a minor variation and strict compliance would be unreasonable and unnecessary.

It is considered that the applicant has demonstrated that the application of the standard is both unreasonable and unnecessary in this instance and that the proposed FSR of the development is in character with the surrounding locality. The request for the maximum FSR to exceed 0.6:1 is supported.

Clause 5.10 - Heritage Conservation

The development is adjacent to The Hill Conservation Area. The development is considered to respect the character of the Conservation Area and is consistent with this clause.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 acid sulphate soils and the proposed development is considered satisfactory in this regard.

5.2 Any draft environmental planning instrument that is or has been placed on public exhibition

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan (NDCP 2012)

The main planning requirements of relevance in the NDCP 2012 are discussed below.

Residential Development - Section 3.03

The objective of this section of the NDCP 2012 is to improve the quality of residential development. This can be achieved through a design that has a positive impact on the streetscape through its built form, maximising the amenity and safety on the site and creating a vibrant place for people to live in a compact and sustainable urban form.

The following comments are made concerning the proposed development and the relevant provisions of section 3.03.

Principal controls (3.03.01)

A Frontage widths

The development is a modification to a previously approved development (DA 2015/0878) and does not propose to amend the frontage width. This control is not required to be considered under this application.

B Front setbacks

The front setbacks for both dwellings are not being altered from the original approved scheme and are considered to achieve the required setbacks.

C Side and rear setbacks

The development does not achieve the acceptable solutions in respect of side and rear setbacks. The development addresses the performance criteria as follows:

1. Prevailing in the street and local area. Development is consistent with and complements the desired built form.

Response: The development is considered to be consistent with the desired built form in the area as it proposed for a dual-occupancy development that is considered to complement the surrounding built form.

2. Setbacks maintain the amenity and privacy of public spaces and adjoining dwellings and their private open space.

Response: The development is considered to maintain the amenity and privacy of adjoining dwellings and their open space areas.

3. Significant views from adjoining properties are maintained.

Response: The development proposes a change in height to that approved under DA2015/0878 however the change in height is considered minor and not considered to impact on significant views from adjoining properties which are significantly altered as a result of the approved development.

4. Sufficient landscape and deep soil areas are provided around the development to conserve existing trees and to accommodate intensive new landscaping.

Response: The development provides for sufficient landscape and deep soil area for both units.

D Landscaped Area

The development is considered to be consistent with the performance criteria as follows:

1. New development integrates into established streetscapes and neighbourhoods.

Response: The development is considered to integrate into established streetscapes and neighbourhoods.

2. Landscaped areas are sized and located so that the amenity and privacy of adjoining dwellings is maintained.

Response: The amenity and privacy of adjoining dwellings will be maintained as a result of the location of the landscaped areas.

3. Landscaped areas are of usable size and proportions to add value and quality of life for occupants within a development in terms of privacy, outlook, views and recreational opportunities.

Response: The landscaped areas are of a sufficient size to add value and quality of life for future occupants.

4. New development respects and incorporates existing established trees and provides appropriate sized places and soil depths for the planting of new medium and large sized trees.

Response: The development site is clear of trees.

Siting the development (3.03.02)

A Local character and context

Response: The development includes a design statement in accordance with this control.

B Public domain Interface

Response: Whilst the Private Open Space (POS) areas are located in front of the building line to Bingle Street, these areas are not visible from the street and have direct visibility to the driveway for Unit 1. In addition, windows and balconies overlook these areas.

The proposed POS areas are considered to be consistent with this control.

A Pedestrian and vehicle access

Response: This application does not propose any changes to the pedestrian and vehicular access approved under DA 2015/0878.

A Orientation and siting

Response: This application does not propose to significantly amend the orientation and siting of the approved development. A minor amendment to the siting of the western wall of Unit 2 is proposed however this change is not considered to be significant. This amendment will also result in this wall being built within the subject site.

A Building Separation

Response: This application does not propose to amend the building form and building separation approved under DA 2015/0878.

Amenity (3.03.03)

A Solar and daylight access

Response: This modification application does not propose to substantially alter the development as approved under DA 2015/0878 however the development achieves the required solar access for the living rooms and private open space areas.

B Natural ventilation

Response: Both dwellings are suitably cross ventilated in accordance with this control.

A Ceiling heights

Response: The development is considered to achieve the performance criteria for this control. Sufficient ventilation and daylight access is proposed to both dwellings.

D Dwelling size and layout

Response: This modification application does not propose to significantly alter the dwelling size approved under DA 2015/0878. The dwelling sizes for both units are considered to be acceptable in relation to this control.

E Private Open Space

Response: The development achieves the requirements of this control in respect of POS provision.

F Storage

Response: The storage areas provided in this modification application have not been significantly altered from that approved under DA2015/0878 however both units provide sufficient storage in compliance with this control.

G Car and bicycle parking

Response: The provision of car and bicycle parking was approved under the original development application for the site and is not proposed to be changed under this modification application.

H Visual privacy

Response: The development ensures that visual privacy to surrounding properties is protected. All balconies and open space areas have sufficient screening. In addition, screening is to be applied to windows as a condition of consent.

The development is considered to achieve the requirements of this control.

I Acoustic privacy

Response: The development is considered to achieve the requirements of this control and is not considered to result in unacceptable noise impacts to surrounding properties.

Configuration (3.03.04)

A Architectural design and roof form

Response: The roof form is integrated with the overall building form in compliance with this control.

A Visual appearance and articulation

Response: The building facades contain a balance of solid and void elements and a range of materials including brick and cladding. The building entries are considered to be well defined and building services are integrated within the overall façade. The development achieves the requirements of this control.

Environment (3.03.05)

A Energy efficiency

Response: The development provided an outdoor area for clothes drying which is screened from the public and communal areas.

A Water management and conservation

Response: Each dwelling is provided with an individual meter and stormwater treatment and disposal has been approved under DA2015/0878.

C Waste management

Response: The waste management proposal for the site has been approved as part of DA2015/0878. Waste management is not proposed to be changed under this modification application and is considered acceptable.

The proposed development is considered acceptable in relation to the abovementioned the NDCCP 2012 sections and achieves relevant acceptable solutions and performance criteria for building form, building separation and residential amenity.

The development establishes a scale and built form appropriate for its location. The proposal provides good presentation to the street with good residential amenity, while maintaining privacy for adjoining neighbours.

Soil Management - Section 5.01

The majority of the earthworks required for the development have been approved under the original development application for the site (DA2015/0878). This modification application proposes the relocation of the western wall of Unit 2 as a result of compliance action. The proposed level of cut and fill is considered acceptable and is less than the maximum recommended under this control.

Heritage Conservation Areas - Section 5.0

The subject site is not within a conservation area but is adjacent to The Hill conservation area. The development is not considered to impact on the character of the streetscape and is considered to be of a similar scale to surrounding properties. The development is therefore not considered to impact on the character of the adjoining conservation area.

Landscape Open Space and Visual Amenity - Section 7.02

The landscape and open space areas within the development are of a sufficient size to be useable and are considered to comply with the criteria set out in this control.

Traffic, Parking and Access - Section 7.03

The car parking and access arrangement has been approved as part of the original development application for this site (DA2015/0878). This modification application does not propose to amend the approved car parking and access arrangements.

Section 7.05 - Energy Efficiency

The proposal is acceptable having regard to this section.

Stormwater- Section 7.06 and Water Efficiency - Section 7.07

The stormwater management proposal for the site has been approved under the original development application for the site. This modification application does not propose to amend the stormwater management proposal except to relocate the approved water tanks on site.

This does not impact on the approved stormwater management proposal for the site and is considered acceptable.

Waste Management - Section 7.08

Demolition and waste management will be subject to conditions recommended to be included in any development consent to be issued.

5.4 Planning agreements

No planning agreements are relevant to the proposal.

5.5 The regulations (and other plans and policies)

The application has been considered pursuant to the provisions of the EP&A Act and the Environmental Planning and Assessment Regulation 2000 (Regulation). In addition, a requirement to comply with AS2601 – Demolition of Structures will be included in the conditions of consent for any demolition works.

5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

Impacts upon the natural and built environment have been discussed in this report in the context of relevant policy, including the NLEP 2012 and the NDCP 2012 considerations. In addition, the following impacts are considered relevant.

Acoustic Impacts

This application proposes minor modifications to the originally approved development application for the subject site. Acoustic impacts were assessed as part of the original application and considered acceptable. The modifications proposed in this application will not result in an increase in acoustic impacts.

Bulk and Scale

This modification application proposes an increase in the height of the approved development for the site. The development has been assessed in respect of the potential impact of the height increase on the amenity of neighbouring properties and the character of the area. Whilst the development will result in further impacts to the view loss and solar access of surrounding properties, these impacts are considered acceptable in respect of CN's amenity controls.

Overshadowing

The development will result in an increase in overshadowing to surrounding properties. The applicant has provided overshadowing diagrams demonstrating that the development will not result in an unacceptable level of overshadowing to surrounding properties including 16 Bingle Street.

Privacy

The development will not unacceptably impact on the amenity of surrounding properties. Where balconies are proposed, these balconies have been screened. In addition, windows to habitable rooms in the development have been sited to minimise overlooking to surrounding properties, in particular, to 20B Hillview Crescent and 16 Bingle Street.

View Loss

View loss will occur to surrounding properties as a result of the approved development for the site. The increase in height will result in a further loss of view from these surrounding properties (particularly 16 Bingle Street). However, the view loss relates to sky view only. The modified development will retain the long views from surrounding properties as approved under the original application.

The proposed development will not have any undue adverse impact on the natural or built environment.

The development is compatible with the existing character, bulk, scale and massing of development in the immediate area.

It is considered that the proposal will not have any relevant negative social or economic impacts.

5.7 The suitability of the site for the development

The site is suitable for the proposed development as it is located in the Newcastle City Centre, which is well serviced by public transport and community facilities. It is considered that adequate services and waste facilities are available to the development.

A grade access to the site will be available for pedestrians, from adjacent roads and public transport. Having regard for the City Centre location and the availability of public transport services, it is considered that the proposed use is satisfactory in respect of its accessibility.

The site is not subject to any other known risk or hazard that would render it unsuitable for the proposed development.

5.8 Any submissions made in accordance with the EP&A Act or the Regulations

The application was publicly notified in accordance with CN's CPP and 12 submissions were received. Two submissions were from the same household and three submissions were late, accordingly, seven submissions were received within the notification period.

The key issues raised within the submissions have been discussed previously in this report. The following table provides a summary of the other issues raised and a response to those issues.

Issue	Comment
Development will approve unauthorised and illegal works	This development application seeks to regularise unauthorised works that have already occurred on site. This includes an increase in the height of the building and amendments to some of the approved external

	<p>and internal walls. Given an Occupation Certificate has not been issued for the development, the applicant can legally submit a modification application.</p> <p>Whilst the majority of the unauthorised works are covered in this application, there are works not included. There are two locations where walls relating to the development have been constructed on adjoining land without consent (20 Hillview Crescent and 22 Hillview Crescent). These works are not included within this development application and are being resolved by CN's compliance team who have issued a Notice of Intention (NOI) to the site owner to remove the offending structures</p> <p>Accordingly, this development application is acceptable.</p>
<p>Impact on views</p>	<p>The development has been assessed in respect of its impact on the views from surrounding properties across the site. The original approved development results in a loss of long views from properties on Bingle Street to the north. The proposed modification application results in a minor increase in height of the roof line of both dwellings. This increase does not result in a further loss of horizon views from surrounding properties (in particular 16 Bingle Street). Instead, the increase results in a minor loss of sky view only. The impact of the height increase to 16 Bingle Street is demonstrated in drawing SK1.</p> <p>Given the minor loss of sky view only, the modification proposal is not considered to unacceptably impact on the approved view loss from surrounding properties.</p>
<p>Overshadowing impacts to surrounding properties</p>	<p>The modifications within this application will result in an increase in the building height of the approved development, which results in a minor increase in overshadowing to surrounding properties. This overshadowing from the subject development has been assessed and the development will not result in an unacceptable impact in respect of overshadowing to surrounding properties.</p>

	In respect of 16 Bingle Street, upon request the applicant provided a detailed façade study demonstrating the overshadowing to this property. This study is included in the documentation in Attachment A and shows the development will not result in an unacceptable level of impact to this property.
Structural damage to adjacent structures including retaining walls	Concerns have been raised in respect of the impact of the development on the structural stability of structures on the site including a retaining wall. The subject development does not include any alterations to retaining walls on site. The maintenance of these walls is the onus of the owners of the land and is not assessed as part of this application. It is noted however that, as CN is the PCA for the development, this issue will be able to be monitored during the construction stage of the development.
The development will impact on existing easements on site	The subject development does not include the creation or alteration of easements on site. Existing easements are legal entities and not managed through the planning process. Should there be issues in respect of the existing easement on site, this will need to be dealt with through the legal process.

5.9 The public interest

The proposed development is considered to be satisfactory having regard to the principles of ecologically sustainable development.

The proposal is consistent with CN's urban consolidation objectives, making more efficient use of the established public infrastructure and services.

The proposed development will not result in the disturbance of any endangered flora or fauna habitat or otherwise adversely impact on the natural environment.

The development is in the public interest and will allow for the orderly and economic development of the site.

6.0 CONCLUSION

The proposal is acceptable against the relevant heads of consideration under section 4.15(1) of the EP&A Act and is supported on the basis that the recommended conditions in **Attachment B** are included in any consent issued.

ATTACHMENTS

Item 46 Attachment A: Plans and elevations of proposed development as amended – 20A Hillview Crescent, The Hill

Item 46 Attachment B: Draft Schedule of Conditions - 20A Hillview Crescent, The Hill

Item 46 Attachment C: Processing Chronology – 20A Hillview Crescent, The Hill

Item 46 Attachments A – C distributed under separate cover